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No. 87-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE JANUARY, 1986 GRAND JURY NO. 217,

JACK AND WANDA BERNSTEIN,

Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District, Third Division

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction over this Case?

II. Whether the decision of the Illinois Appellate Court, to grant petitioners immunity toward the act of producing voluntarily kept business records comports with the requirements of the fifth amendment to the United States Constitution?

III. Whether the required records exception to the fifth amendment privilege against compelled self-incrimination is still viable?

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PRAYER

Respondent asks this Court to deny the Petition for Writ of Certiorari to review the judgment and opinion of the Illinois Appellate Court, First District, entered April 15, 1987.

OPINIONS BELOW

The petitioners seek review after the Illinois Appellate Court, First District, rendered its opinion in *In re January, 1986 Grand Jury*, No. 217, 155 Ill. App. 3d 445, 508 N.E.2d 277 (1st Dist. 1987). The opinion is included in the Petition for Writ of Certiorari. The Illinois Supreme Court denied leave to appeal, 116 Ill. 2d 555, ____ N.E.2d ____, October 20, 1987.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition. However, there is no case or controversy here. The case is moot. In any event, as treated more fully in the argument, petitioners have not shown grounds for this Court to exercise its sound jurisdiction to grant the Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional and state statutory provisions involved are fully set forth in the Petition.

STATEMENT OF FACTS

A statement of facts is adequately set forth in the Illinois Appellate Court opinion, 155 Ill. App. 3d 445, 508 N.E.2d 277 (1987) which appears in the Petition at App. 1.

REASONS FOR DENYING THE WRIT

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decisions below. This case is moot, and in any event presents no novel or pressing federal constitutional issue worthy of review here. The decisions of the Illinois courts were in keeping with federal constitutional mandates promulgated by this Court.

I.

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION WHERE THE CASE IS MOOT.

Pursuant to investigation for the possibility of crimes by petitioners, in violation of the Illinois Retailers' Occupation Tax Act and the Illinois Income Tax Act for the years 1982, 1983, and 1984, the Cook County Grand Jury, in January, 1986, issued a subpoena *duces tecum*, demanding that petitioners provide certain documents pertaining to their business for the years 1982 through 1984.

Criminal prosecutions under the Retailers' Act are subject to a three year statute of limitations. *See Ill. Rev. Stats.* (1985) ch. 120, §452. Any indication of a crime under this act which occurred during the years in question are

crimes for which petitioners cannot be prosecuted pursuant to the instant grand jury. Prosecution for crimes which occurred during the years preceding 1985 can only take place as a result of an additional grand jury investigation that would reveal the possibility of similar crimes which are not outside the statute of limitations. Only then, could crimes outside the statute of limitations attach. However, here there is no current grand jury investigation of the petitioners for crimes under the Retailers' Act. Although the statute of limitations under the Illinois Income Tax Act is five years, and has passed with regard to crimes which have occurred prior to 1983, because there is no current grand jury investigation for crimes under this act, prosecution pursuant to the instant grand jury can likewise not ensue.

Since the statute of limitations has passed, criminal prosecution under the Illinois Retailers' Occupation Tax Act, and similarly for the years prior to 1983 under the Illinois Income Tax Act, is barred. In any event, there is no further grand jury investigation of the petitioners for the possibility of crimes under both acts. Thus, there is no case or controversy. The case is moot, and this Court lacks jurisdiction.

II.

THE DECISION OF THE ILLINOIS COURTS TO GRANT TRANSACTIONAL IMMUNITY TOWARD THE ACT OF PRODUCING VOLUNTARILY KEPT BUSINESS RECORDS DOES NOT BAR THE STATE FROM PROSECUTING PETITIONERS FOR TAX FRAUD AND COMPORTS WITH THE REQUIREMENTS OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is firmly established that business records which are required to be kept by law are not protected by the fifth

amendment privilege against compelled self-incrimination. *Shapiro v. United States*, 331 U.S. 1, 68 S.Ct. 1375 (1948). *Ill. Rev. Stat.* (1985) ch. 120, §446 sets forth the records required to be kept pursuant to the Illinois Retailers' Occupation Tax Act. All of the subpoenaed records falling within this statute are thereby not subject to the privilege.

Likewise, the federal constitutional issue presented here with respect to voluntarily kept business records has already been decided by this Court. *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984), teaches that voluntarily kept business records are not protected by the fifth amendment privilege against self-incrimination. However, the act of producing such documents pursuant to a grand jury subpoena constitutes compulsion of the following testimony:

1) that the documents exist;
2) that the documents are those sought by the state;
3) that the documents are authentic; and
4) that the witnesses possess the documents.

Thus, to comply with the fifth amendment, a grant of at least use immunity must be afforded toward any crime inherent in the compelled testimony. With a grant of use immunity toward the act of producing the voluntarily kept documents, prosecution can still occur for crimes revealed by the act of production. However, testimony inherent in the act of producing the records is barred from evidence.

In Illinois, the only immunity recognized is transactional immunity. See *Ill. Rev. Stats.* (1985) ch. 38, §§106-1, 106-2. This form of immunity offers greater protection than the federal use immunity. In this case, contrary to the premise of petitioners' argument, the Illinois Appellate Court has agreed that not only is the testimony which is re-

vealed as a result of the act of producing the records barred from use, but the petitioners are immunized against prosecution for any criminal act inherent in the production of the compelled testimony. Thus, the grant of immunity complies with the federal constitutional mandates indigenous to the fifth amendment, and in fact exceeds the minimal requirements. Any argument as to the interpretation of the Illinois immunity statute is strictly a matter of state law. This Court does not generally exercise its jurisdiction to decide disputes over a state's interpretation of its own law.

III.

THE REQUIRED RECORDS EXCEPTION TO THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION HAS NOT BEEN OVERRULED.

Petitioners maintain that with this Court's decisions in *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569 (1976) and *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984), this Court abandoned a "content oriented" approach used to examine the nature of the subpoenaed documents for fifth amendment purposes, in favor of a consideration of circumstances related to the compulsion in the act of producing the documents. The petitioners insist that because there is compulsion in a statutory requirement to maintain certain business records, and because there is government compulsion when such records are subpoenaed, that the *Act of Production Doctrine* should apply to the required records as well. Thus, a grant of immunity is necessitated toward the production of all subpoenaed documents whether or not they are required to be kept, and the *Required Records Doctrine* is no longer viable.

Petitioners' reasoning, however, is incorrect. The decisions in *Fisher* and *Doe* simply clarified the fifth amend-

ment privilege with respect to voluntarily kept records and do not apply to cases where required records are at issue. These decisions in no way affect the *Required Records Exception* which is still viable. The *Required Records Doctrine* is premised on a long established rationale, that an individual choosing to do business in an area where the law requires the maintenance of certain records, waives any fifth amendment privilege with respect to those records. *See Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 544-545 (1911) and cases cited therein, *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 1385 (1948). No federal circuit has accepted petitioners' idea. However, at least four federal circuits have emphatically rejected it. *See In re Grand Jury Subpoena Duces Tecum, Underhill*, 781 F.2d 64, 69-70 (6th Cir. 1986); *In re Grand Jury Proceedings, McCoy*, 601 F.2d 162 (5th Cir. 1979); *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336, n. 15 (3rd Cir. 1982); *In re Doe*, 711 F.2d 1187, 1191-1192 (2d Cir. 1983).

The application of the fifth amendment with regard to required records is clearly defined by this Court's decision in *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1948) and no immunity is warranted. The application of the fifth amendment with regard to voluntarily kept business records is clearly defined by this Court's decision in *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984). Under *Doe*, a grant of immunity need only be afforded toward the act of producing the voluntarily kept business records which become the subject of a grand jury subpoena, and the *Required Records Doctrine* is not applicable where voluntarily kept records are at issue. Thus, no novel or pressing issue exists, and the case is not worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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